

FCC MAIL SECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 981-37
 Washington, D.C. 20554

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| In re Applications of |) | MM Docket No. 88-275 |
| |) | |
| FLAGSTAFF BROADCASTING |) | File No. BPH-860707NQ |
| FOUNDATION |) | |
| |) | |
| FLAGSTAFF BROADCASTING |) | File No. BPH-860707OC |
| PARTNERSHIP |) | |
| |) | |
| For Construction Permit For a |) | |
| New FM Station on Channel 261C2 |) | |
| at Flagstaff, Arizona |) | |

ORDER

Adopted: August 26, 1998

; Released: August 28, 1998

By the Assistant General Counsel, Administrative Law Division:

1. This order grants the Joint Request for Approval of Universal Settlement filed January 30, 1998 and amended July 13, 1998 by Flagstaff Broadcasting Foundation and Flagstaff Broadcasting Partnership, as well as the Motion for Leave to Amend filed July 13, 1998 and Supplemented August 17, 1998 by Flagstaff Broadcasting Partnership. Comments were filed by the Mass Media Bureau on August 20, 1998.

2. By its Memorandum Opinion and Order, 8 FCC Rcd 8550 (1993), the Commission reaffirmed its previous grant of Flagstaff Broadcasting Partnership's application and the denial of Flagstaff Broadcasting Foundation's application. Thereafter, the latter filed an appeal of the Commission's denial of its application with the United States Court of Appeals for the District of Columbia Circuit (Case No. 94-1010). By its Order of May 16, 1994, the court remanded this case to the Commission for further consideration in light of the decision of the Court of Appeals in Bechtel v. FCC, 10 F. 3rd 875 (D.C. Cir. 1993), holding that the integration of ownership into management criterion used by the Commission to decide among competing applicants was unlawful.

3. The applicants have now entered into a settlement agreement which they have attached to their Joint Request. Pursuant to that agreement, the application of Flagstaff Broadcasting Foundation would be dismissed in return for a payment totalling \$80,000.00, Flagstaff Broadcasting Partnership's application would, in return for a further payment of \$100,000.00 be amended to substitute a new entity, Rocket Radio Corp.; and Flagstaff Broadcasting Partnership's application would be granted, with Rocket substituted for Flagstaff Broadcasting Partnership as the surviving applicant. The staff of the Mass Media Bureau has reviewed the settlement proposal, noting that, since Rocket is a licensee of Station KQST(FM), Sedona, Arizona, in the area to be served by the new station, the qualifications of Rocket's principals have been previously passed upon by the Commission and that there is, thus, no need

for publication of its substitution for Flagstaff Broadcasting Partnership. See Rebbeca Radio of Marco, 4 FCC Rcd 830, at 833 (1989). Furthermore, the Bureau points out that the contour of the proposed Flagstaff station is completely encompassed by the principal city contour of Rocket's KQST(FM). Commission records reflect that there are six commercial stations licensed to serve Flagstaff and one licensed to serve Sedona. Under Section 73.3555(a) of the Commission's Rules, 47 C.F.R. § 73.3555(a), an applicant in a market with 14 or fewer commercial radio stations may own up to five commercial radio stations, not more than three of which may be in the same service, provided that a party does not own more than 50 percent of the stations in the market. Because Rocket will own only two stations in the market, which is less than 50 percent of the total serving Flagstaff (as defined by the area of overlapping principal community contours), the Bureau concludes that Rocket is in compliance with Section 73.3555(a) of the Commission's Rules. Finally, because Rocket proposes to locate the new station's antenna on a tower which is already occupied by KQST(FM) and KBPX(TV), the Bureau requests that conditions, specified below, be imposed on Rocket.

4. Congress has enacted Section 3002(a)(3) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997), which added a new Section 309(l) to the Communications Act of 1934. Section 309(l) requires the Commission, for requests executed during the 180-day period after enactment, to "waive any provisions of its regulations necessary" to permit persons, who, before July 1, 1997, filed competing applications for construction permits for new commercial radio or television stations, to enter an agreement to procure the removal of a conflict between their applications. In accordance with this mandate, the requirements of Section 73.3525(a) pertaining to the amounts to be paid to dismissing applicants will be waived in this case. See Gonzales Broadcasting, Inc., 12 FCC Rcd 12253 (1997). Moreover, the Commission has indicated that, in order to facilitate resolution of frozen hearing cases, it is inclined to waive its policy against settlements involving the award of a construction permit to a non-applicant third party, such as Rocket Radio. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, FCC 97-397, released November 26, 1997 ¶ 26. We find it in the public interest to waive that policy here.

5. The applicants have also shown that their Joint Petition complies in all respects with the requirements of 47 U.S.C. § 311(c) and the provisions of 47 C.F.R. § 73.3525(a) which replicate Section 311. The applicants have provided sworn statements that there is no other consideration for the dismissal of this application, that their applications were not filed for the purpose of reaching or carrying out a settlement agreement, and that approval of the agreement will serve the public interest by facilitating the institution of new FM radio service for Flagstaff, Arizona and by terminating this litigation. Finally, Rocket Radio has shown that it is qualified to be a licensee and that it is in full compliance with the Commission's multiple ownership rules, and the petition proposing to amend Flagstaff Broadcasting Partnership's application by substituting Rocket Radio as the applicant will be granted.

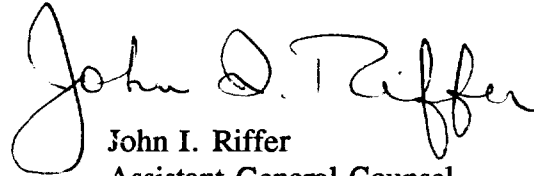
6. ACCORDINGLY, IT IS ORDERED, That, pursuant to the authority delegated under 47 C.F.R. § 0.251(c), the Joint Request for Approval of Universal Settlement filed January 30,

1998 and amended July 13, 1998 by Flagstaff Broadcasting Foundation and Flagstaff Broadcasting Partnership IS GRANTED and the attached settlement agreement IS APPROVED; the Motion for Leave to Amend filed July 13, 1998 and Supplemented August 17, by Flagstaff Broadcasting Partnership IS GRANTED and the attached amendment IS ACCEPTED; the application of Flagstaff Broadcasting Foundation (File No. BPH-860707NQ) IS DISMISSED; and the application of Flagstaff Broadcasting Partnership, as amended to substitute Rocket Radio Corp. as the applicant (File No. BPH-860707OC), IS GRANTED subject to the following conditions:

1. Before Program Tests commence, sufficient measurements shall be made to establish that the operation authorized in the construction permit is in compliance with the spurious emissions requirements of 47 C.F.R. Sections 73.317(b) through 73.317(d). All measurements must be made with all stations simultaneously utilizing the shared antenna. These measurements shall be submitted to the Commission along with the FCC Form 302-FM application for license.
2. The permittee/licensee in coordination with other users of the site must reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radio frequency electromagnetic (RF) fields in excess of FCC guidelines.
3. The Automatic Program Test provisions of 47 C.F.R. Section 73.1620 DO NOT APPLY in this case. A formal request for Program Test Authority must be filed in conjunction with FCC Form 302-FM, Application for License, before program tests will be authorized. This request should be submitted at least 10 days prior to the date on which program tests are desired to commence. This request must contain documentation which demonstrates compliance with the following special operating condition: The permittee/licensee shall, upon completion of construction and during the equipment test period, make proper RF field strength measurements throughout the transmitter site area to determine if there are any areas that exceed the FCC Guidelines for human exposure to RF fields. If necessary, a fence must be constructed at such distance and in such a manner as to prevent the exposure of humans to RF fields in excess of the FCC Guidelines (OET Bulletin No. 65, Edition 97-01, August 1997). The fence must be a type which will preclude casual or inadvertent access and must include warning signs at appropriate intervals, which describe the nature of the hazard. Any areas within the fence found to exceed the recommended guidelines must be clearly marked with appropriate visual warning signs.
4. Documentation demonstrating compliance with the special operating condition may be submitted in advance of the filing of FCC Form 302-FM. The Commission's staff will review it for compliance and respond by letter stating whether automatic Program Test Authority has been reinstated.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, reading "John I. Riffer". The signature is fluid and cursive, with the first name "John" being the most prominent part.

John I. Riffer
Assistant General Counsel
Administrative Law Division
Office of General Counsel